STATE OF MICHIGAN

COURT OF APPEALS

USHA SHAH, Plaintiff-Appellant,	UNPUBLISHED December 27, 2011
v	No. 303135 Ingham Circuit Court
BON TON DEPARTMENT STORES, INC. d/b/a YOUNKERS, Defendant-Appellee.	LC No. 10-000074-NO

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting summary disposition to defendant. We affirm.

Plaintiff was injured when she slipped and fell just inside the door of a Younkers department store. Plaintiff and her sister-in-law had delayed going to the store until after a heavy afternoon rain. The two entered the store through one of three entrances, using one of two doors on either side of an automatic sliding door. The sliding door had been disabled by store personnel in order to minimize the amount of water accumulating on the floor inside the outer entrance. The floor was carpeted in front of the sliding door, but not in front of either side door. The path into the store from the side doors consisted of marble tile. Plaintiff challenges the grant of summary disposition to defendant under MCR 2.116(C)(10) (no genuine issue of material fact) on the ground that the danger presented was open and obvious. The parties do not dispute plaintiff's status as an invitee.

"This court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In general, the possessor of land must use reasonable care in order to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the property owner need not protect an invitee from open and obvious dangers, unless "there are 'special aspects' of a condition that make even an 'open and obvious' danger 'unreasonably dangerous.'" *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004), quoting *Lugo*, 464 Mich at 516. A dangerous condition will be considered open and obvious where an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). This is an objective test that considers "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Id*. at 479.

We agree with the trial court that the condition that caused plaintiff's injury was open and obvious as a matter of law. In her deposition, the store's human resources manager and acting store manager testified that there were four yellow warning "cones" just inside the outer doors when plaintiff entered. Further, she testified she was in the process of placing a fifth cone in the area when the accident occurred. These assertions were corroborated by still photographs of the security video footage, which clearly indicated that there were at least four yellow warning signs or "cones" just inside the outer doors at the time of the accident, including one almost directly in front of where plaintiff's accident occurred.

Moreover, plaintiff admitted that it had rained heavily in the afternoon prior to her trip to Younkers. A reasonable person would likely be aware that there may be water on the floor inside a building as a result of the opening of the outer doors during the rain by persons entering and leaving the building, as well as people tracking it in on their shoes or having it drip from off their person.[1]

We also reject plaintiff's argument that the court erred in determining that there were no special aspects present which would make the hazard presented unreasonably dangerous. Citing *Lugo*, plaintiff argues that she encountered an effectively unavoidable condition because of the lack of proper warning of the danger. This is merely a reiteration of the argument raised with

[1] Plaintiff relies on *Bialick v Megan Mary, Inc*, 286 Mich App 359; 780 NW2d 599 (2009), in support of the proposition that a court should not find a danger open and obvious based solely on the presence of drizzly or misty conditions outside. *Bialick* rejected the "defendant's argument that plaintiff should have been aware of a potentially hazardous condition inside the building based solely on the 'drizzly' or 'misty' weather outside, because our focus must be on the objective nature of the condition of the premises at issue." *Id*. at 364. Defendant in the case at hand is not making such an argument. Indeed, defendant relies to a great extent on the placement of the yellow "cones" by the doors. In *Bialick*, the owner of the premises was not able to say if a warning sign had been posted, and the plaintiff indicated that she did not see a sign. *Id*. at 361, 363.

respect to the open and obvious quality of the danger, which we have already concluded is without merit.

Moreover, we note there were three entrances to the Younkers store. Plaintiff could have chosen to use any of the three, including entering through the mall entrance, which arguably would not have been heavily affected by the inclement weather outside. Further, plaintiff could have simply assessed the situation and decided to come back when the conditions might be drier.

Finally, plaintiff argues that summary disposition was inappropriate because the trial judge improperly made credibility determinations when deciding the motion. Plaintiff points to the judge telling her counsel, "I have a great deal of problem with your client's credibility." However, this statement did not amount to a determination as to plaintiff's credibility; rather, the judge was merely noting that he questioned plaintiff's credibility. While the prudent course would have been not to raise the matter at all in a hearing on a motion for summary disposition, see *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), it is clear from the record that the judge considered the objective evidence, including plaintiff's testimony, in the appropriate light when reaching the conclusion that defendant was entitled to judgment as a matter of law.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter